Supreme Court, U.S.
FILED
NOV 20 2003
OFFICE OF THE CLERK

No. 03-595

In The Supreme Court of the United States

JOSEPH SINGER, Individually and on Behalf of Others Similarly Situated; CHARLES LINDORFER, Individually, and on Behalf of Others Similarly Situated; ROSALIO AMARO; CARL B. AMMANN; JAMES A. BAKER; ET AL.,

Petitioners,

v.

THE CITY OF WACO, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LU PHAM
Counsel of Record
BETTYE LYNN
LYNN PHAM MOORE & ROSS, PC
1320 S. University Drive,
Suite 720
Fort Worth, Texas 76107
(817) 332-8505

KAREN S. PRECELLA
HAYNES AND BOONE, LLP
201 Main Street,
Suite 2200
Fort Worth, Texas 76102
(817) 347-6600

ARTHUR PERTILE, III
City Attorney
City of Waco, Texas
P.O. Box 2570
Waco, Texas 76702
(254) 750-5680

Counsel for Respondent, The City of Waco, Texas

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. The Fair Labor Standards Act gives courts broad powers to fashion legal and equitable remedies in order to assure that plaintiffs/employees are adequately compensated. 29 U.S.C. §216(b). The first question presented is:

   > Whether the FLSA allows courts the power to fashion an equitable remedy that does not result in a windfall to Petitioners by allowing overpayments made in some work periods to offset underpayments made in other work periods?

2. The Department of Labor regulations expressly state that the regular hourly rate of pay of an employee is determined by dividing the employee's total remuneration for employment in any work period by the total number of hours *actually worked* by the employee during that work period. 29 C.F.R. §778.109. The second question presented is:

   > Whether Petitioners' hourly rate of pay is properly calculated by dividing their work period salary by the total number of hours actually worked, including overtime hours, in the work period?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
REASONS TO DENY WRIT	6
I. The Broad, Equitable Powers Conferred by the FLSA Allow Courts to Fashion a Remedy That Does Not Result in a Windfall to Petitioners	6
II. An Employee's Hourly Rate is Properly Calculated by Dividing The Work Period Salary by the Total Number of Hours *Actually Worked*, Including Overtime Hours, During the Work Period	10
CONCLUSION AND PRAYER FOR RELIEF	13

TABLE OF AUTHORITIES

Page

CASES:

Abby v. City of Jackson, 883 F. Supp. 181 (E.D. Mich. 1995) 7

Kohleim v. Glynn County, GA, 915 F.2d 1473 (11th Cir. 1990) 7

Lee v. Coahoma County, Miss., 937 F.2d 220 (5th Cir. 1991) 11, 12

Lee v. Coahoma County, Miss., 37 F.3d 1068 (5th Cir. 1993) 11

Roland Electrical Co. v. Black, 163 F.2d 417 (4th Cir. 1947) 7, 8

York v. City of Wichita Falls, 856 F. Supp. 1191 (N.D. Tex. 1994) 12, 13

York v. City of Wichita Falls, 48 F.3d 919 (5th Cir. 1995) 12, 13

UNITED STATES STATUTES:

29 U.S.C. §201 1

29 U.S.C. §§201-219 4

29 U.S.C. §207(e) 6, 7

29 U.S.C. §207(e)(5) 9

29 U.S.C. §207(e)(6) 9

29 U.S.C. §207(e)(7) 9

29 U.S.C. §207(h) 8

29 U.S.C. §207(k) 5

29 U.S.C. §216(b) 2, 3, 4

TABLE OF AUTHORITIES – Continued

Page

REGULATORY PROVISIONS:

29 C.F.R. §553.233 10

29 C.F.R. §778.107 13

29 C.F.R. §778.108 13

29 C.F.R. §778.109 ..... 3, 4, 10, 11, 13

29 C.F.R. §778.114 11

CONSTITUTIONAL PROVISIONS:

Article III, Section 53 of the Texas Constitution 1, 9

BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent, the City of Waco, Texas, presents this Brief in Opposition to the Petition for Writ of Certiorari by Joseph Singer, Charles Lindorfer, and 178 other individually named members of the Waco Fire Department ("Petitioners"), and respectfully requests that this Court deny Petitioners' Writ of Certiorari.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fair Labor Standards Act, 29 U.S.C. §§201, *et seq.*, the regulations promulgated relative thereto by the Department of Labor ("DOL"), and the Texas Constitution.

The following are pertinent constitutional, statutory, and regulatory provisions to Respondent's Brief in Opposition:

Article III, Section 53 of the Texas Constitution

> The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

29 U.S.C. §216(b). Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become

a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which

(1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefore under the provisions of this subsection or

(2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

29 C.F.R. §778.109. The regular rate is an hourly rate.

The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exceptions discussed in §§778.400 through 778.421. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following sections give some examples of the

proper method of determining the regular rate of pay in particular instances: (The maximum hours standard used in these examples is 40 hours in a workweek).

STATEMENT OF THE CASE

This is a wage dispute brought as a collective "opt-in" action under Section 216(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. Petitioners are Joseph Singer, Charles Lindorfer, and other similarly situated fire suppression and fire alarm (or dispatch) employees of the City of Waco Fire Department. Petitioners are non-exempt employees under the FLSA. During the time period at issue, Respondent paid Petitioners on an annual salary basis. (Pet. App. 3a).

Fire suppression employees worked 24-hour shifts every third day; that is, they would work 24 hours, then be off work for 48 hours. (Pet. App. 3a, 43a). Respondent paid fire suppression employees every 14 days. (*Id.*). Based on the 24-hour shift schedule, fire suppression employees worked 120 hours in one 14-day period, 120 hours in the next 14-day period, and 96 hours in the third 14-day pay period, with the cycle repeating itself. (*Id.*). Despite the variance in the number of hours Respondent scheduled fire suppression employees to work during each pay period, Respondent paid them a fixed salary representing 106 hours straight time, and six hours of scheduled overtime at a rate of one and one-half times their regular rate of pay (for a total of 112 hours) each 14-day pay period. (*Id.*).

To determine the "regular rate of pay" of fire suppression employees for purposes of calculating their overtime rate, Respondent took the employee's annual salary and divided it by 2,912. (Pet. App. 3a). This represented a three year average number of work hours, including scheduled overtime, a fire suppression employee worked during a year because of the varying numbers of hours they worked per 14-day pay period (*i.e.*, 120/120/96). Respondent's method of paying a fixed sum for 106 hours of straight time and six hours overtime every 14-day pay period resulted in *overpayments* to fire suppression employees in those pay periods in which they worked only 96 hours, and underpayments when they worked 120 hours. (Pet. App. 3a, 43a).

Petitioners filed suit against the City of Waco and asserted that Respondent had miscalculated their "regular rate of pay" for purposes of determining overtime pay. (Pet. App. 3a). Respondent counterclaimed and maintained it overpaid Petitioners, thus, it was entitled to a credit for any overpayment of wages to Petitioners. Additionally, Respondent asserted in its counterclaim against Petitioners that it was entitled to a refund for the excess wages paid to the Petitioners. A bifurcated trial was held, with the issue of liability under the FLSA decided by the jury and the amount of damages determined by the District Court. The jury determined that Respondent had established a 14-day work period, rather than a 28-day work period, under the FLSA's §207(k) exemption. (Pet. App. 6a). The District Court held, *inter alia*, that the proper method of calculating the hourly rate of pay for purposes of determining overtime pay was to divide the fire suppression employees' work period salary by the total number of

hours actually worked in each 14-day work period. (Pet. App. 16a, 45a-46a). The District Court also credited overpayments made by Respondent every third pay period against underpayments made in the other two pay periods. (Pet. App. 19a, 46a). The Fifth Circuit Court of Appeals *affirmed* the District Court's decision. (Pet. App. 25a).

Petitioners now appeal to this Court, asserting that the proper method of calculating an hourly rate of pay is determined by dividing the work period salary into the non-overtime hours worked, as opposed to the actual hours worked, including overtime hours. Additionally, Petitioners assert that overpayments made by Respondent every third work period (*i.e.*, the period where Petitioners worked 96 hours but Respondent paid them for 106 hours of straight time and six hours of overtime) should not be applied to underpayments in the other two work periods (*i.e.*, the periods where Petitioners worked 120 hours but Respondent paid them only for 106 hours of straight time and six hours of overtime).

REASONS TO DENY THE WRIT

I. The Broad, Equitable Powers Conferred By The FLSA Allow Courts To Fashion A Remedy That Does Not Result In A Windfall To Petitioners.

Petitioners complain that the District Court and the Fifth Circuit Court of Appeals panel erred when they credited overpayments made by Respondent against Petitioners' damages for unpaid overtime. Petitioners contend that an employer's entitlement to a credit or offset for overpayments are limited to those described by §207(e)

of the FLSA, and may be applied to damages for unpaid overtime arising only during work periods in which the overpayments occurred.

Petitioners' argument misses the point. Section 216(b) of the FLSA gives courts broad powers to fashion legal and equitable remedies in order to assure that FLSA plaintiffs are adequately compensated. On the other hand, the courts may fashion a money judgment that does not result in a windfall for plaintiffs. Accordingly, FLSA defendants may be credited for overpayments of wages without regard to the work period in which the overpayments occurred. *See Kohleim v. Glynn County, GA,* 915 F.2d 1473, 1481 (11th Cir. 1990); *Abby v. City of Jackson,* 883 F. Supp. 181, 186-87 (E.D. Mich. 1995).[1]

Likewise, Respondent is entitled to a credit for overpayments it made to Petitioners. It is abundantly clear that Respondent paid Petitioners extra compensation as pre-payments, so as to avoid uneven paychecks. Significantly, the FLSA does *not* prohibit employers from prepaying its employees.

Plaintiffs also argue that the Fifth Circuit Court of Appeals' decision affirming the offset in damages is in direct conflict with the Fourth Circuit's decision in *Roland Electrical Co. v. Black* 163 F.2d 417 (4th Cir. 1947), *cert. denied,* 333 U.S. 854, 68 S.Ct. 729, 92 L.Ed. 1135 (1948). However, Petitioners inaccurately rely on *Roland Electrical,* as it can easily be distinguished from the facts in this

[1] The cases upon which Plaintiffs rely on this issue are distinguishable because they specifically involve payments made under § 207(e) of the FLSA.

case. In *Roland Electrical,* the employer sought to offset premium pay for undesirable hours against overtime liability for hours worked in excess of the statutory maximum. The Fourth Circuit disallowed this practice because the premium pay was not intended to be compensation for the overtime mandated by the FLSA. *Roland Electrical, supra,* at 420-421. Specifically, the Fourth Circuit stated, "[the payments] were paid as compensation for services previously rendered in order to allow the employees to share in the profits of the business and to incite them to further efforts in the company's behalf." *Id.* at 421.[2]

This case differs from *Roland Electrical* in that it involves premium payments, which are extra payments for work performed and the crediting of the premium pay to offset damages. Respondent made no such premium payments. Rather, the overpayments received by Petitioners were intended as payment for overtime, not as bonuses to Petitioners. Section 53 of the Texas Constitution prohibits its municipalities from making bonus payments to its employees. Therefore, *Roland Electrical* does not control the issue at hand. Accordingly, the District Court and the Fifth Circuit Court of Appeals did not err by allowing Respondent to offset *all* overpayments it was owed.

Finally, Petitioners argue that Respondent failed to properly establish a pre-payment schedule. However, Petitioners' argument is again misplaced. Even if the Court were to find that Respondent failed to properly

---

[2] Furthermore, *Roland Electrical* was decided before §207(h) was enacted in 1949, and thus the Fourth Circuit did not address the issue of crediting.

establish a pre-payment plan, such failure should not result in a windfall for Petitioners.

Not only is such a windfall disfavored by the FLSA, but it is also expressly prohibited by the Texas Constitution. Article III, Section 53 of the Texas Constitution provides:

> The Legislature shall have *no* power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

TEX. CONST. ART. III §53 (emphasis added). Because the City of Waco is a municipality and is prohibited from making bonus payments, gifts, or other excess payments to employees, Petitioners must return all overpayments.

The FLSA does not state that only payments enumerated in 29 U.S.C. §207(e)(5), (6), and (7) may be credited toward overtime owed. Therefore, without any statutory provision disallowing a credit for pre-payments, Respondent is entitled to offset any payment of overtime owed to Petitioners with the pre-payments it made to Petitioners. To disallow an offset would work an injustice to the citizens of Waco and give Petitioners an unjustified windfall. Indeed, the District Court expressly held that:

> "failure to take some account of these overpayments would be inconsistent with the purposes of the FLSA – to put the (Petitioners) in the same position they would have been had they been

> paid correctly. . . . To argue that the FLSA prevents the Court from taking into account the overpayment misconstrues the Court's conclusion. The offset determination made by the District Court was clearly based in equity, and not the strictures of the FLSA." (Pet. App. 54a).

II. An Employee's Hourly Rate Is Properly Calculated By Dividing The Work Period Salary By The Total Number Of Hours *Actually Worked*, Including Overtime Hours, During The Work Period.

The Department of Labor (DOL) regulations state that a regular rate of pay for employees paid on a salary basis "must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek. . . . " 29 C.F.R. §778.109. Section 778.109 also states that the hourly rate must be calculated by dividing the work period salary by the total number of hours *actually worked* in the work period, including overtime hours:

> The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek[3] by the total number of hours *actually worked* by him in that workweek for which such compensation was paid.

---

[3] The rules for computing an employee's "regular rate" of pay are applicable to employees for whom the Section 7(k) exemption is claimed. However, wherever the word "workweek" is used, the words "work period" should be substituted. 29 C.F.R. §553.233.

29 C.F.R. § 778.109 (emphasis added). Accordingly, the DOL regulations contemplate a different hourly rate when employees are paid a salary, but work a different number of hours each work period.

Petitioners complain that the factual circumstances of this case do not meet the criteria set forth in the DOL regulations governing fixed salary for fluctuating work period arrangements. 29 C.F.R. §778.114. Petitioners' argument is again misplaced, because the fluctuating work period regulation allows employers to pay overtime at a half-time rate, as opposed to a rate of one and one-half times the regular rate of pay. 29 C.F.R. §778.114. However, there is no dispute that Respondent has always calculated overtime at a rate that is one and one-half times the regular rate of pay. Since the issue is *how* an hourly rate is calculated (as opposed to whether the half-time method of paying overtime), §778.109 governs this matter, as discussed above. 29 C.F.R. §778.109.

Petitioners erroneously rely on *Lee v. Coahoma County, Miss.* for the proposition that hourly rates are determined by dividing the work period salary by the non-overtime hours worked. *Lee v. Coahoma County, Miss.*, 937 F.2d 220 (5th Cir. 1991), *corrected by Lee v. Coahoma County, Miss.*, 37 F.3d 1068 (5th Cir. 1993). Petitioners' position is supported only by a stretched reading of the language articulated by the *Coahoma County* opinion:

> In determining each deputy's hourly wage in a given work period . . . the court should divide the [work period salary] by the number of *regular hours* which may be worked in that work period according to 29 C.F.R. § 553.233. This will result in a determination of each deputy's appropriate

> hourly wage in the work period determined by the district court.

Id. at 1069 (emphasis added).

The Fifth Circuit Court of Appeals properly stated that Petitioners misconstrued the term "regular hours," to mean "non-overtime hours." (Pet. App. 17a). Accordingly, work period salaries should be divided by the total number of regularly assigned hours, including scheduled overtime hours.

Furthermore, *Coahoma County* does *not* control the issue presented with respect to the formula for "regular rate of pay." The parties in *Coahoma County* did not present to the Fifth Circuit Court of Appeals the question of whether regularly scheduled overtime hours worked during a salaried employee's work period should be used in determining the "regular rate of pay." Thus, contrary to Petitioners' assertion, the Fifth Circuit Court of Appeals did not disregard its prior holding in *Coahoma County*.

Contrary to Petitioners' argument, the *York v. Wichita Falls* cases hold that the regular rate of pay is determined by dividing the work period salary into the total hours worked, including overtime hours. *York v. City of Wichita Falls*, 856 F.Supp. 1191 (N.D. Tex. 1994); *York v. City of Wichita Falls*, 48 F.3d 919 (5th Cir. 1995). The *York* plaintiffs objected to the City of Wichita Falls' use of an artificial regular rate of pay for overtime calculations,[4] and

[4] The City of Wichita Falls recalculated wages to lower the hourly rate such that fire fighters were paid exactly the same level of annual compensation for regularly scheduled hours. *York v. City of Wichita Falls*, 48 F.3d at 922, n. 17 (5th Cir. 1995).

maintained that the City should have determined a fire fighter's regular rate of pay by dividing his annual salary by his regularly scheduled hours, including overtime hours. *York v. City of Wichita Falls*, 856 F.Supp. at 1201; *York v. City of Wichita Falls*, 48 F.3d at 922. Both the Northern District of Texas and the Fifth Circuit Court of Appeals held that the *York* plaintiffs' argument was valid under 29 U.S.C. §207 and 29 C.F.R. §§ 778.107-109 as codified **today** (*i.e.*, after April 15, 1986). *York*, 856 F.Supp at 1201; 48 F.3d at 922 (emphasis in original). Thus, the Fifth Circuit Court of Appeals has consistently held that where an employee is paid on a salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours worked, including overtime hours.[5]

CONCLUSION AND PRAYER FOR RELIEF

Respondent respectfully requests that the Court deny Petitioners' Writ of Certiorari with respect to the formula for determining Petitioners' "regular rate" of pay and with

[5] As an alternative, Petitioners assert that the regular rate of pay should be determined by dividing the work period salary by the number of hours they were ***scheduled*** to work, including scheduled overtime hours, but not unscheduled overtime. However, Petitioners neglected to present at trial any damage calculation based on this formula. (Pet. App. 39a)

respect to the exercise of equitable powers to offset overpayment against underpayment of wages.

Respectfully submitted,

LU PHAM
Counsel of Record
Texas Bar No. 15895430
BETTYE LYNN
Texas Bar No. 11540500
LYNN PHAM MOORE & ROSS, PC
1320 S. University Drive,
Suite 720
Fort Worth, Texas 76107
Telephone: 817.332.8505
Telecopy: 817.332.8548

KAREN S. PRECELLA
Texas Bar No. 16245550
HAYNES AND BOONE, LLP
201 Main Street
Fort Worth, Texas 76102
Telephone: 817.347.6600
Telecopy: 817.347.6650

ARTHUR PERTILE, III
Texas Bar No. 15815200
City Attorney
City of Waco, Texas
P.O. Box 2570
Waco, Texas 76702
Telephone: 254.750.5680
Telecopy: 254.750.5880

Attorneys for Respondent,
the City of Waco, Texas